

1 **ADAM J. BREEDEN, ESQ.**
Nevada Bar No. 008768
2 **BREEDEN & ASSOCIATES, PLLC**
7432 W. Sahara Ave., Suite 101
3 Las Vegas, Nevada 89117
Phone: (702) 819-7770
4 Fax: (702) 819-7771
Adam@Breedendandassociates.com
5 *Attorneys for Plaintiff*

6
7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**

9 LATIA ALEXANDER, individually as heir of
10 ISAIAH T. WILLIAMS and in her capacity as
Special Administrator of the Estate of ISAIAH
11 T. WILLIAMS,

12 Plaintiff,

13 v.

14 LAS VEGAS METROPOLITAN POLICE
DEPARTMENT, a political subdivision of the
15 State of Nevada; KERRY KUBLA, in his
16 individual capacity; BRICE CLEMENTS, in
his individual capacity; ALEX GONZALES,
17 in his individual capacity; RUSSELL
BACKMAN, in his individual capacity;
18 JAMES ROTHENBURG, in his individual
capacity; JAMES BERTUCCINI, in his
19 individual capacity; DOES I-XX, inclusive,

20 Defendants.
21

CASE NO. 2:24-cv-00074-APG-NJK

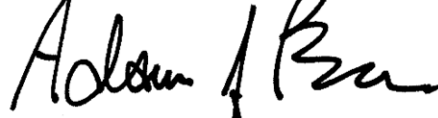
**PLAINTIFF'S MOTION TO DISMISS
DEFENDANT KERRY KUBLA'S
COUNTERCLAIMS [ECF # 12]**

22 Plaintiff LATIA ALEXANDER, individually as heir of ISAIAH T. WILLIAMS and in her
23 capacity as Special Administrator of the Estate of ISAIAH T. WILLIAMS, through her attorney,
24 ADAM J. BREEDEN, ESQ. hereby moves the Honorable Court to dismiss Defendant KERRY
25 KUBLA's Counterclaims [ECF #12] for personal injury. This Motion is brought pursuant to the
26 Federal Rules of Civil Procedure 12(b)(6) and is based on all of the pleadings and papers on file
27 herein, the attached Memorandum of Points and Authorities, and the oral arguments of counsel at
28

1 the time of the hearing in this matter, if any.

2 DATED this 12th day of February, 2024.

3 BREEDEN & ASSOCIATES, PLLC

4 

5 **ADAM J. BREEDEN, ESQ.**

6 Nevada Bar No. 008768

7 7432 W. Sahara Ave., Suite 101

8 Las Vegas, Nevada 89117

9 Phone: (702) 819-7770

Fax: (702) 819-7771

Adam@Breedendassociates.com

Attorneys for Plaintiff

10 **MEMORANDUM OF POINTS AND AUTHORITIES**

11 **I. INTRODUCTION**

12 In this civil rights/wrongful death action arising from a fatal police shooting of a 19 year old
13 black man during a SWAT entry of a residence, Defendant Officer KERRY KUBLA has filed a
14 counterclaim for personal injuries he sustained in the incident from the decedent. However,
15 KUBLA's counterclaims were not filed within the two-year statute of limitations and the Nevada
16 Supreme Court has already definitively ruled that, unlike the law in some other states, the filing of
17 a civil complaint does not toll the statute of limitations for a Defendant to file counterclaims. *Nev.*
18 *State Bank v. Jamison Family P'ship*, 106 Nev. 792, 798-99, 801 P.2d 1377, 1382 (1990) ("a
19 plaintiff, by instituting an action before the expiration of a statute of limitation, does not toll the
20 running of that statute against compulsory counterclaims filed by the defendant after the statute has
21 expired"). Therefore, the District Court must dismiss the counterclaims as they were untimely filed
22 twenty six days after expiration of the statute of limitations.

23 **II. BACKGROUND AND PROCEDURAL HISTORY**

24 This civil rights wrongful death case arises out of a police SWAT entry of an apartment
25 which occurred on January 10, 2022.¹ Per the Complaint, on that date at 5:00 a.m., police forcibly
26

27 _____
28 ¹ Complaint at ¶ 16.

1 entered an apartment to serve a purported search warrant on a third party they apparently believed
 2 lived at the property.² The suspect was, in fact, not at the apartment nor was any evidence of the
 3 crime the officers were investigating.³ Instead, the SWAT team of at least twelve officers forcibly
 4 entered the apartment without completing the Constitutional knock-and-announce requirement.⁴
 5 They startled a sleeping, 19 year old black man, decedent ISAAH WILLIAMS, who apparently
 6 mistakenly believed police were intruders.⁵ Therefore, having only seconds to react, WILLIAMS
 7 opened fire after police battered down the apartment door, broke the apartment living room window
 8 and deployed a noise bang device which sounded like gunfire and would have led WILLIAMS to
 9 believe he was already under assault.⁶ In the ensuing chaos, WILLIAMS was shot multiple times
 10 and killed.⁷ His mother, LATIA ALEXANDER, filed suit individually and as Special Administrator
 11 of WILLIAMS' Estate. Her Complaint was filed on January 9, 2024, essentially one day before the
 12 two-year statute of limitations for the claims expired. She sued both LAS VEGAS METRO-
 13 POLITAN POLICE DEPARTMENT and six of the individual officers involved in the forcible
 14 entry.

15 This present Motion to Dismiss concerns a counterclaim filed by Defendant Officer KERRY
 16 KUBLA against the ESTATE OF WILLIAMS. It was known to Plaintiff from public press releases
 17 by LAS VEGAS METROPOLITAN POLICE DEPARTMENT that Defendant KUBLA was shot
 18 at least three times in the chaos, presumably by WILLIAMS before he was fatally wounded.
 19 Although Plaintiff does not know the full extent of KUBLA's injuries, it is alleged in the
 20 Counterclaim that he was shot in both arms and the hip as well as the chest, although his body armor
 21

22
 23 ² Complaint at ¶ 18-19. The word "purported" is used to describe the warrant because, more than
 24 two years after the shooting, Plaintiff still has never located the warrant the police claim they were
 serving at the time of the incident.

25 ³ Complaint at ¶ 38.

26 ⁴ Complaint at ¶ 25-32.

27 ⁵ Complaint at ¶ 36.

28 ⁶ Complaint at ¶ 36.

⁷ Complaint at ¶ 36.

1 stopped that bullet from entering his chest.⁸ KUBLA filed a counterclaim for two state law causes
 2 of action, assault/battery and negligence, with his Answer filed on February 5, 2024. This is **two**
 3 **years and twenty-six days** after the date of the incident.

4 It is uncontestable that KUBLA failed to file his counterclaims within the two-year statute
 5 of limitations for personal injury claims in Nevada. Therefore, ALEXANDER moves to dismiss
 6 these counterclaims against the ESTATE OF WILLIAMS.⁹

7 **III. LAW AND ARGUMENT**

8 It is well-accepted that a claim may be dismissed under FRCP 12(b)(6) on the ground that it
 9 is barred by the applicable statute of limitations when "the running of the statute is apparent on the
 10 face of the complaint." *Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 997 (9th Cir. 2006). In this
 11 case, the statute of limitations governing the parties' claims and counterclaim are dictated by Nevada
 12 law, the state in which the incident occurred, which is two years. NRS § 11.190(4)(e); *see also*
 13 *Perez v. Seevers*, 869 F.2d 425, 426 (9th Cir. 1989) (discussing Nevada statute of limitations).
 14 KUBLA's counterclaims are filed invoking the District Court's supplemental jurisdiction under 28
 15 USC § 1367.¹⁰ The US Supreme Court and the Ninth Circuit has made clear that *Erie* principals
 16 regarding application of state law in federal court applies to such claims. In fact, the Ninth Circuit
 17 has held that not only does the law of the forum state dictate the statute of limitations to be applied,
 18 but additionally the law of the forum state dictates the *tolling rules* to be applied to the statute of
 19 limitations as well. *See Felder v. Casey*, 487 U.S. 131, 151, 108 S. Ct. 2302, 101 L. Ed. 2d 123
 20 (1988) (federal court exercising supplemental jurisdiction over state law claims should apply
 21 substantive state law); *Guaranty Trust Co. v. York*, 326 U.S. 99, 109-10, 65 S. Ct. 1464, 89 L. Ed.

22
 23 ⁸ Counterclaims of Kubla (Feb. 5, 2024) at Paragraph 17.

24 ⁹ Under Nevada law, Plaintiff Alexander is not personally liable for any debts of the Estate of
 25 Williams merely by nature of her being Special Administrator. *See*, NRS § 140.040 (special
 26 administrator not personally liable for debts of the estate). The Counterclaims appear to make it
 27 clear that Alexander is only sued in her capacity as Special Administrator of the Estate, and not in
 her individual capacity for any negligence or act of her own. Alexander was not at the scene of the
 incident and did not have any personal involvement.

28 ¹⁰ Counterclaims of Kubla (Feb. 5, 2024) at Paragraph 2.

1 2079 (1945) (statute of limitations is substantive); *Albano v. Shea Homes Ltd. P'ship*, 634 F.3d 524,
2 530 (9th Cir. 2011) ("Federal courts must abide by a state's tolling rules, which are integrally related
3 to statutes of limitations."). Therefore, this Court must apply Nevada's two-year statute of
4 limitations as well as Nevada's statute of limitations tolling principles (or lack of the same) to
5 KUBLA's counterclaims.

6 This is where the Counterclaims encounter problems. Under Nevada law, personal injury
7 actions are subject to the two-year statute of limitations under NRS § 11.190(4)(e). Under Nevada
8 law, the limitation period begins when the relevant claim accrues, meaning "when a suit may be
9 maintained thereon." *Clark v. Robison*, 113 Nev. 949, 944 P.2d 788, 789 (Nev. 1997) (per curiam).
10 Generally, a suit may be maintained once "the aggrieved party knew, or reasonably should have
11 known, of the facts giving rise to the damage or injury." *G & H Assocs. v. Ernest W. Hahn, Inc.*,
12 113 Nev. 265, 934 P.2d 229, 233 (Nev. 1997) (per curiam). It would be difficult for KUBLA to
13 argue that somehow he did not know he had been shot on January 10, 2022 or would not know he
14 may have claims against the Estate of the person shooting him arising out the incident. *See* NRS §
15 41.100 ("Except as otherwise provided in this section, no cause of action is lost by reason of the
16 death of any person, but may be maintained by or against the person's executor or administrator.")
17 Therefore, KUBLA's two-year statute of limitations started accruing on January 10, 2022, the date
18 of the incident. He plainly missed his two-year filing deadline by filing two years and twenty-six
19 days after the incident.

20 Some states, notably California, have a state statute or rule which provides that once a
21 plaintiff files claims, the complaint tolls the statute of limitations and allows the filing of
22 counterclaims on which the statute of limitations would have otherwise expired provided that the
23 complaint was filed within the statute of limitations for those counterclaims. *E.g.*, *ZF Micro Devices,*
24 *Inc. v. TAT Capital Partners, Ltd.*, 5 Cal. App. 5th 69, 92, 209 Cal. Rptr. 3d 442, 460 (2016)
25 (providing a detailed explanation of California's tolling rule for counterclaims). In other words, in
26 some states a defendant gets some reprieve from the statute of limitations to file counterclaims after
27 being served with a complaint and can file them with their answer even if the counterclaims were
28 passed the statute of limitations. KUBLA may have believed this was also the rule in Nevada when

1 he filed his counterclaims for state law assault/battery and negligence, both state law claims for
2 which he invoked supplemental jurisdiction.

3 Unfortunately for KUBLA, the state of Nevada does not recognize this type of tolling. *See*,
4 *Nev. State Bank v. Jamison Family P'ship*, 106 Nev. 792, 798-99, 801 P.2d 1377, 1382 (1990) (“a
5 plaintiff, by instituting an action before the expiration of a statute of limitation, does not toll the
6 running of that statute against compulsory counterclaims filed by the defendant after the statute has
7 expired.”). In *Nev. State Bank v. Jamison*, debtors sued a bank for alleged defects in conducting a
8 foreclosure sale of a casino property. They filed their claims, as did Plaintiff ALEXANDER in this
9 matter, one day before the statute of limitations expired. When the bank answered, it asserted various
10 counterclaims, including one for a deficiency judgment. These counterclaims, however, were filed
11 23 days after the deadline the bank otherwise would have had under the statute of limitation to file
12 them had they not been counterclaims. The Nevada Supreme Court was then faced with the question
13 of “whether a plaintiff, by instituting an action before the expiration of a statute of limitation, tolls
14 the running of that statute against compulsory counterclaims filed by the defendant after the statute
15 has expired.” *Id.* at 1381. In analyzing the legal issue, the Nevada Supreme Court found that while
16 some states recognized such tolling, Nevada would not. *Id.* (“a plaintiff, by instituting an action
17 before the expiration of a statute of limitation, does not toll the running of that statute against
18 compulsory counterclaims filed by the defendant after the statute has expired.”). Therefore, the
19 counterclaims had to be dismissed as untimely filed.

20 Indeed, at least one other decision from this District authored by Judge Gordon has
21 recognized that under Nevada law, the filing of a complaint does not toll the time to bring a
22 counterclaim. *Trang v. Bank of George*, No. 2:17-cv-00162-APG-EJY, 2022 U.S. Dist. LEXIS
23 224255 (D. Nev. Dec. 13, 2022) (unpublished). In that case, a homeowner sued a bank, which then
24 attempted to file various counterclaims against the homeowner. In correctly analyzing and rejecting
25 the Bank’s arguments that the homeowner’s complaint had tolled the time to file the bank’s
26 counterclaims, Judge Gordon plainly held that “the Supreme Court of Nevada has held that the
27 commencement of an action does not toll the limitation period of a compulsory counterclaim” and
28 the court was bound by that decision. *Id.* at *18 citing *Nev. State Bank v. Jamison Family P'ship*,

1 106 Nev. 792, 798-99, 801 P.2d 1377, 1382 (1990). The untimely counterclaims were thus
2 dismissed. Therefore, not only has the Nevada Supreme Court recognized that the filing of a
3 complaint does not toll the statute of limitations for KUBLA's claims, but Judge Gordon has
4 previously recognized this binding principal of Nevada state law for state law claims filed in the
5 District of Nevada federal court. Therefore, KUBLA's claims are untimely and should be dismissed.

6 **IV. CONCLUSION**

7 The Court may be sympathetic to KUBLA given that he was a law enforcement officer shot
8 several times in the line of duty. However, Plaintiff wishes to point out as an aside that it does not
9 appear that KUBLA was even going to bring his claims until he was sued. Even had KUBLA's
10 injury claims been timely filed, he would have faced an uphill battle given that he would have to
11 have shown that WILLIAMS lacked a subjective, reasonable belief that he was under imminent
12 threat of harm by an unknown intruder (i.e., lacked a valid affirmative defense of self-defense),
13 which would have been difficult under the totality of the circumstances in this particular case. For
14 example, police did not properly wait after knocking and announcing before they battered the door
15 in, deployed noise flash devises which would impair WILLIAMS' vision and hearing thus his ability
16 comprehend the situation, deployed the noise devises which would have led WILLIAMS to believe
17 he was already being fired, and broke the window out of the apartment feet from where WILLIAMS
18 was sleeping in total darkness at 5:00 a.m. with no reasonable time for WILLIAMS to assess the
19 situation and recognize the officers. Perhaps that uphill battle is why KUBLA had apparently not
20 retained his own injury attorney to file his claims within the two-year statute of limitations; rather
21 his defense counsel filed them only after he was sued as counterclaims. Nevertheless, KUBLA's
22 counterclaims simply never get to their merits. His Counterclaims were simply untimely filed and
23 should be dismissed as filed two years and twenty-six days after the incident when Nevada law
24 requires him to file within two years.

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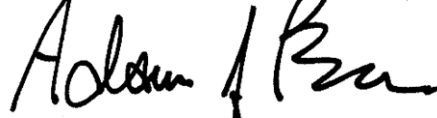
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Respectfully, KUBLA's Counterclaims should be dismissed for failure to file within the statute of limitations.

DATED this 12th day of February, 2024.

BREEDEN & ASSOCIATES, PLLC



ADAM J. BREEDEN, ESQ.

Nevada Bar No. 008768

7432 W. Sahara Ave., Suite 101

Las Vegas, Nevada 89117

Phone: (702) 819-7770

Fax: (702) 819-7771

Adam@Breedendandassociates.com

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of February, 2024, I served a copy of the foregoing legal document **PLAINTIFF'S MOTION TO DISMISS DEFENDANT KERRY KUBLA'S COUNTERCLAIMS** via the method indicated below:

X	Through the Court's ECF/CM system on all registered users
	Pursuant to FRCP 5, by placing a copy in the US mail, postage pre-paid to the following counsel of record or parties in proper person:
	Via receipt of copy (proof of service to follow)

An Attorney or Employee of the following firm:

/s/ Kirsten Brown

BREEDEN & ASSOCIATES, PLLC